IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Chhinder Kaur @ Chhipkali Vs. State of Raj.
(D.B. Criminal Jail Appeal No.138/2003)

2. Roop Narayan @ Roopa Vs. State of Raj.
(D.B. Criminal Jail Appeal No.293/2003)

D. B. Criminal Jail Appeals under Sec.374 (2) Cr.P.C. against the judgment dated 27-11-2002 in Sessions Case No.56/2002 (66/02) passed by Smt. Kamal Dutt, RHJS, Additional Sessions Judge (Fast Track) Alwar.

Date of Judgment: September 18, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE CHATRA RAM JAT

Ms. Rajesh Kandwal, Amicus Curiae, for appellants Chhinder Kaur.
Mr. Dharamveer Tholia, for appellant Roop Narayan.

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

Chhinder Kaur @ Chhipkali and Roop Narayan @ Roopa, the appellants herein, have impugned the judgment dated November 27, 2002 of the learned Additional Sessions Judge (Fast Track) Alwar whereby the appellants were convicted and sentenced as under:-

Roop Narayan @ Roopa:
U/s.302 IPC:
To suffer imprisonment for life and fine of Rs.2000/-, in default to further suffer rigorous imprisonment for one year.

U/s.120B IPC:
To suffer imprisonment for life and fine of Rs.1000/-, in default

to further suffer rigorous imprisonment for six months.

U/s.309 IPC:
To suffer simple imprisonment for one year.

Chhinder Kaur Chhipkali:
U/s.120B IPC:
To suffer imprisonment for life and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for six months.

U/s.309 IPC:
To suffer simple imprisonment for one year.

Substantive sentences were ordered to run concurrently.

2. It is the prosecution case that on April 20, 2002 Roop Narayan administered poison to child Deepu aged 8 months and thereafter Roop Narayan and Chhinder Kaur both consumed poison with the intention to commit suicide. They were taken to the General Hospital Alwar where Deepu was declared dead. A report about the incident was sent by Medical Officer to the SHO Police Station Shivaji Park Alwar. Case under section 302 IPC was registered and investigation commenced. Autopsy on the dead body was performed, necessary memos were drawn, statements of witnesses were recorded and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge (Fast Track) Alwar. Charges under sections 302, 307 alternatively 309 and 120B IPC were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as many as 17 witnesses. In the explanation under Sec.313 CrPC, the appellants claimed innocence. No witness in defence was however examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above.

3. Although as per autopsy report (Ex.P-1) cause of death of Deepu could not be ascertained but a look at the FSL report (Ex.P-13) goes to show that death was caused by poison. FSL report (Ex.P-13) reads as under:-

> "On chemical examination, portions of viscera (1-5) and washing of exhibit No.6 from three packets marked `X' `Y' and `A' gave positive tests for the presence of Chloropyrophos Insecticide."

4. We have heard learned counsel for the parties. The prosecution case is founded on the sole testimony of Jyoti (Pw.11) who on the date of incident was 11 years of age. Jyoti is the daughter of appellant Chhinder Kaur. In her statement under section 161 CrPC (Ex.D-3) Jyoti (Pw.11) stated that her mother Chhinder Kaur and Roopa uncle administered medicine to each other thereafter they poured medicine in the mouth of Deepu. But in her deposition at the trial she took U turn and stated that Roopa administered poison to Deepu and when her mother went to the well, mother of Roopa pushed her mother down and then Roopa administered poison to her mother thereafter Roopa himself consumed poison. Jyoti completely disowned her police statement. She admitted in her cross examination that she was tutored by her father Swarn Singh.

5. We find it unsafe to place reliance on the testimony of Jyoti. In Arbind Singh Vs. State of Bihar (AIR 1994 SC 1068) Hon'ble Supreme Court indicated that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring.

6. Privy Council in Mohamed Sunal Vs. King (AIR 1946 PC 3) indicated thus:-

> "In England where provision has been made for the reception of unsworned evidence, from a child it has always been provided that the evidence must be corroborated in some material particulars implicating the accused. But in Indian Acts there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, court can act upon it. It is sound rule in practice not to act on the uncorroborated evidence of a child, whether sworned or unsworned, but this is a rule of prudence and not of law."

7. It is well settled that the testimony of a child witness should only be accepted after the greatest caution and circumspection. The rational for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about things which he has not seen and once having been tutored, he goes on repeating in a parrot like manner what he has been tutored to state.

8. In his book `Outlines of Criminal Law' (Page 386) Dr. KENNY DOWNING (Professor of `Laws of England' Cambridge University) stated as under:-

> "Children are most untrustworthy class of witnesses, for whom of a tender age as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard of others and greatly influenced by fear of punishment, by hope of reward and desire of notoriety."

9. In Prakash Vs. State of M.P. [1992 Cr.L.J. 3703 (SC)] their Lordships of the Supreme Court held that simply because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored.

10. Even though no procedure is laid down as to the manner of recording the testimony of child witness, we are of the opinion that the court should record the evidence of a child witness in a question answer form. An infant may be sworn in a criminal prosecution provided such infant appears on strict examination by the court to possess a sufficient knowledge of the nature and consequences of oath.

11. Rameshwar Kalyan Singh Vs. State of Rajasthan (AIR 1952 SC 54) the Apex Court observed that in the case of a child, it depends on the capacity of the child, his appreciation of the differences between truth and falsehood as well as his duty to tell the former. The decision of this question rests with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence. The trial Judge may resort to any examination which will tend to disclose the capacity and intelligence and in the case of an oath, his understanding of the obligation of an oath.

12. In Orsu Venkat Rao v. State of Andhra Pradesh (AIR 2004 SC 4961) where the accused was convicted by lower courts relying on the evidence of children, their Lordships of the Supreme Court observed as under:- (Para 11)

> "We are constrained to go into the matter in detail for the reason that the judgment of the High Court is sketchy and slipshod. What all has been said by the High Court is that the evidence of PWs 2 & 16 inspires confidence and their

> testimony remained unshaken in cross examination. It is further observed that the evidence of these witnesses is corroborated by medical evidence without appreciating the fact that PW-18 the doctor was unable to say from the ligature marks or other features, whether the death was suicidal or homicidal. There was no critical evaluation of the evidence of the two child witnesses and there was no consideration of material aspect bearing on the veracity of the version given by PWs 2 & 16. In these circumstances, we cannot put our seal of approval to the conclusions of the High Court though concurrently they are. True, the circumstances raise strong suspicion against the accused, but it is difficult to sustain the conviction, once the evidence of the alleged eye witnesses is discarded as unworthy of credence. This is a case in which benefit of doubt should have been given to the accused."

13. Having closely scanned the testimony of Jyoti (Pw.11) from the point of view of trustworthiness we find that her testimony does not get corroboration from the evidence of other prosecution witnesses. Marium (Pw.3), who was the land lord of Chhinder Kaur, deposed thus:-

> "छिन्दरकौर मुझे खाट पर लेटी हुयी मिली और दीपू भी इसके पास ही लेटा था। फिर मैंने उससे पूछा कि क्या हुआ और उसका दिमाग चकरा रहा था दीपू रो रहा था फिर इसने मुझे बताया कि मैने जहर पिया है। और दीपू को भी जहर दे दिया है। छिन्दरकौर का आदमी पोस्त खाता है और कमाता नहीं है। ... छिन्दरकौर ने कहा कि मैं भूखी मरती हूं इसलिए जहर खाया है। हमने छिन्दरकौर को तीन तीन दिन तक भूखे मरते देखा है।"

14. Having carefully considered the material on record, we find that the prosecution is unable to establish charges against the appellant beyond reasonable doubt.

15. For these reasons, we allow the appeals and set aside the impugned judgment dated November 27, 2002 of Additional Sessions Judge (Fast Track) Alwar. We acquit the appellants of the charges under sections 302, 120B and 309 IPC. The appellants Chhinder Kaur @ Chhipkali and

Roop Narayan @ Roopa, who are in jail, shall be set at liberty forthwith, if they are not required to be detained in any other case.

(Chatra Ram Jat),J. (Shiv Kumar Sharma)J.

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